(18)

Supreme Court of the United States

October Term, 1942.

No. 116.

NIESCHLAG & CO., INC.,
Petitioner,

AGAINST

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

Petition for Re-Hearing on Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

HAROLD T. EDWARDS,
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CASES CITED.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Summary Statement as to Jurisdiction.

The petition for Writ of Certiorari was denied by this Court on October 12, 1942.

Questions Presented and Reasons for Granting Re-Hearing.

The importance of the question to those engaged in trade and in financing trade, particularly of an international or maritime sort, as well as the need, oft expressed by this Court, of conforming our marine and insurance decisions to those of the British Courts (*Queen Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487,

493), and of ironing out conflicting Circuit Court or State decisions, impel us to ask this re-hearing.

The frame of the question, so important commercially, is simple; an importer approaches another for finance on the collateral of negotiable warehouse receipts; the other to insure delivery insists upon protection against all warehouse risks by negotiable insurance certificates; the proposed lender, after twice rejecting negotiable certificates insuring only physical risks, fire, etc., suggests and accepts insurance against "non-delivery" which the importer secures from a marine insurance company which has long insured in large sums for the importer under an open marine policy covering goods in warehouse during "shipment, trans-shipment or re-shipment" (Rec. p. 57, par. 14 A: the only reason for a marine policy). The marine insurance company knew of and had long insured much of the importer's business and knew of his prior control of the warehouse and that the lender would not loan unless non-delivery was insured. By virtue of a control over the warehouse the importer, according to the Court below, issued the warehouse receipts on goods which did not belong to him. The marine insurance company prior to this transaction knew the importer was a large borrower on the collateral of its negotiable insurances and of the warehouse receipts issued when the importer controlled the warehouse and that the importer had the facility for emitting receipts with no goods behind them. Because, as the lower Court found in this proceeding for summary judgment (on disputed interpretation of a reclamation order) there were no goods in the warehouse belonging to the importer, there was no delivery and the lender sues the marine insurance company on its negotiable certificates.

Although the policy expressly excluded "non-delivery" insurance, requiring it to be "specially" written, the company pleaded a clause therein requiring ownership of or

interest in goods as a condition to coverage. The Court below held—on affidavits, refusing a jury trial—, that the insurance company only intended to cover non-delivery if the importer had an interest in the goods, thus applying the rule applicable to physical risks, when damage is to the *res;* it rejected the lender's claim that the insurance was addressed to the delivery obligation of the warehouseman, although admitting the question was close as to whether a jury should pass on the meaning. This was in reference to the rule that the meaning of an insurance contract is a jury question.

Its holding was contrary to the doctrine of the House of Lords (*Phoenix Ins. Co.* v. *deMonchy* [H. L.] 45 T. L. R. 543 [C. of A.] 44 T. L. R. 364, 366, 368, 369) that negotiable certificates of insurance cannot be qualified by an underlying contract of insurance, particularly where no reference is necessary because the negotiable certificates of themselves completely insure.

If this were a surety bond or guaranty, the lower court's opinion admits that recovery should be had and that in such instruments the words "non-delivery" run to the obligation to deliver rather than the goods and would cover what commonly in law is a warehouseman's failure to deliver. The Court cites for this *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* 59 F. (2d) 493; *Maryland Casualty Co.* v. *Washington Loan & B. Co.,* 145 S. E. 761, 766 (Ga. 1929); *Ryan* v. *United States,* 19 Wall. 514, 22 L. Ed. 172, but in citing *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* ignores that the instrument there was held to be insurance, although in the form of a bond and thus the common meaning of "non-delivery" was assimilated to the instrument and non-existence of that to be delivered was held no defense.

Undeniably in warehouse and bill of lading law failure to deliver because of facts similar to those here is a "non-

delivery''; in fact one right of redress is called non-delivery.

The lower court's opinion thus ignores the rule that the common meaning of words in commercial documents is, so far as possible, to be assimilated to all documents,—a rule especially applied to insurance and bills of lading (*The G. R. Booth,* 171 U. S. 450, 459-460).

The opinion also rejects application of the old established canon of *contra proferentem* contrary to the leading New York case of *Bushey & Sons* v. *American Ins. Co.,* 237 N. Y. 24.

Contrary, therefore, to the House of Lords and raising a conflict among Circuits, not to speak of the New York Court of Appeals, the holding effectually prevents an importer or lender by insurance from covering what commonly is regarded as a non-delivery.

That this ruling seriously hampers international trade and financing thereof there can be no doubt. What is a banker or importer now to do? The post-war upbuilding of the world is one of the paramount aims of the United Nations and particularly of our Government. Encouragement of international trade is primary in these aims.

But if warehouse receipts or bills of lading are presented to a banker as the basis for a loan,—the goods being stated to be in a remote part of the world, such as South America or Malay, either in a warehouse or on a boat (which may well be that of a small irresponsible company) and the banker says that he cannot know whether the ownership of the goods is in the warehouse receipt holder, and wants delivery assured by non-delivery insurance,—the lower court's holding is to the effect that insurance cannot perform this important function.

It can be done by a surety bond, the court says, containing identically the same language as in the insurance

policy. But surety bonds require a principal and he may be in Ecuador or Malay. It may be impossible to get his signature. The result, of course, will be no financing and hence no trade.

No less harm to trade and commerce is done by the repudiation of the "negotiable" doctrine of marine negotiable insurance certificates developed at great pains to meet the needs of traders and bankers,—and this by eliminating as against the lender defences personal to the original parties. These negotiable certificates have become a bulwark of international trade. Thayer has well developed this in *Thayer Marine Insurance Certificates* [1935] 49 Harv. Law Rev. 239, 244.

Is this doctrine to be thrown aside—are bankers and importers no longer to be able to rely on the protection of negotiability? If so, an effective implement of trade has been destroyed.

It will not do to say, as is tacitly inherent in the opinion below, that the banker or importer may expressly write in the negotiable certificate that the coverage is on the warehouse obligation or is good irrespective of ownership of the goods. Practical protection to the lender requires that it look only to the obligations to deliver and to the insurance thereof. Otherwise, trade cannot continue for in every instance the lender must get a lawyer who must draft complete coverage in long verbiage. This is why *contra proferentem* exists,—the insurance company has "a lawyer at his elbow",—a trained body of insurance experts and if it wishes conditions it has long since been required to specify them (Mr. Justice Stone in *Aschenbrenner* v. *U. S. F. & G. Co.*, 292 U. S. 80, 85).

Not only does its importance but constitutional rights to a jury trial require that this question be not disposed

of on conflicting affidavits, in a summary judgment proceeding.

Respectfully submitted,

NIESCHLAG & CO., INC.,

By HAROLD T. EDWARDS,
Counsel.

Dated, New York, November 5, 1942.

We hereby certify that we are counsel for petitioner in the above matter in this Court; that we each have examined the foregoing petition and in our opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for purpose of delay.

HAROLD T. EDWARDS,
CHARLES A. ELLIS.